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FCC Forum Addressing Combinations of Unbundled Network Elements
June 4, 1998
The Technical, Economic, and Legal Issues Associated With Alternatives to Collocation
Opening Statement of Leonard Cali of AT&T Corp.

Good Morning. My name is Leonard Cali, and I am a General Attorney in AT&T's Law and Public Policy organization. I am here to address the legal issues associated with logical recombination of network elements.

When the Eighth Circuit vacated section 315(b), it took away the right of CLECs under federal law to get access to combinations of network elements as they are combined in incumbent LEC networks. With that decision, the most promising avenue for widespread competition in local telephone markets for residential and business customers was closed.

Of course, that decision is on appeal, and we hope and trust that the Supreme Court will reverse it. But in the meantime (at least), we live in a world in which CLECs may be left, as the Eighth Circuit put it, to "combine the unbundled elements themselves." And that requirement, in turn, has led AT&T to do some hard thinking about how best to carry out this new responsibility.

The bottom line is simple. If we have to combine elements, then we ought to be permitted to combine them the same way the ILECs do -- by using the recent change capability inherent in the switch. As Bob Falcone discussed earlier, it is technically feasible for the incumbent LECs to make this capability available to CLECs -- indeed, they've already proven they can do it by making essentially the same capability available to their Centrex customers.

Given these facts -- and they are undisputed -- the legal authority for the recent change method is plain on the face of the statute. Section 251(c)(3) imposes a duty on incumbent LECs to make the recent change process available to CLECs. Specifically, Section 251(c)(3) requires incumbent LECs to provide other carriers:

> First, with "nondiscriminatory access" to unbundled "network elements";
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> Second, with nondiscriminatory access "at any technically feasible point" chosen by requesting carriers; and
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> Third, with access "in a manner that allows requesting carriers to combine such elements."

The recent change method meets all three criteria. It is the same method that the ILECs use to combine network elements; it is accessible at a technically feasible point (namely, the BOCs' OSS); and it allows a CLEC to combine multiple elements.

Of course, the incumbent LECs object to this approach -- if they didn't, we wouldn't be here today. But before I address their principal objections, let me make one threshold observation. The BOCs have raised no serious statutory argument against the recent change approach. The only statutory argument that they have raised to date is the claim that the express duty imposed by Section 251(c)(3) -- to provide nondiscriminatory access at any

technically feasible point -- does not mean what it plainly says. In their view, Section 251(c)(6) trumps Section 251(c)(3), and limits all CLECs to only one point of access -- collocated space in or adjacent to an ILEC's central office.

That argument just doesn't hold water. The FCC expressly rejected that theory in the Local Competition Order and in Rule 321(b) -- which the Eighth Circuit upheld. And to my knowledge, no regulatory body has ever accepted that view, and for good reason: Both the plain language of Section 251(c)(3) and the legislative history foreclose it. The language of the statute makes it clear that the duty to provide physical collocation is in addition to the duty to provide access at any technically feasible point. And the legislative history makes it clear that Congress felt it needed to make the physical collocation duty explicit in the statute because of the D.C. Circuit's decision in the Bell Atlantic case. There is simply no reasonable way to read the collocation duty as a limitation, rather than an expansion, of the ILECs' duty to provide access to their networks.

So the ILECs have no serious statutory argument against recent change -- and that should be the end of the matter.

But in the absence of any credible statutory challenge, what the ILECs have done is raise a series of rhetorical objections to the recent change process. While the words differ, they all amount to the same point: recent change isn't painful enough for the CLECs -- it

doesn't raise their costs or harm their customers enough -- it doesn't kill UNE-competition like a collocation requirement will.

To that point one can only respond with a question: Since when did foisting gratuitous costs and risks on a competitor become a virtue? How can it be that the right solution -- the one that a federal agency should adopt, that is best for consumers, that Congress will be presumed to have wanted -- is the option that makes it harder for new entrants to compete, that degrades customer service, increases the risk that customers will lose service if they dare to change phone companies, and raises prices? Of course that sort of solution is not the answer, and no one -- not Congress, and not the Eighth Circuit -- ever said it was.

What the BOCs point to of course is the language in the Eighth Circuit's opinion concerning that court's expectation that the use of UNE-combinations will impose costs and risks that resale does not. But the use of recent change will clearly impose costs and risks that the use of resale or existing combinations will not. Those costs and risks are lower than with collocation, but they are there and they are real.

Unlike collocation, however, recent change at least holds out the prospect of making competition using UNE-combinations thinkable, which it simply is not with collocation. And that is important, because as the Eighth Circuit itself acknowledged, "the Act itself calls for the rapid introduction of competition into local phone markets by requiring incumbent LECs to make their networks available to competing carriers."

The BOCs also claim that the FCC and DOJ already decided this issue when they told the Supreme Court in their cert petition that the premise of the Eighth Circuit's decision was to require the "physical" separation of elements. That is simply not the case.

In discussing the meaning of the term "unbundled," the government's cert petition uses the term "physical" to draw a contrast between the functional or operational separation that the Eighth Circuit required and the economic separation -- that is, "separate pricing" -- that we and the FCC pointed out was the traditional meaning of the term "unbundled." The government's cert petition was not discussing the ILECs purported distinction between "physical" and "logical" means of combining elements. That issue was not even briefed until comments were filed concerning BellSouth's Louisiana application, which occurred after the cert petitions were filed.

Nor could the Eighth Circuit have required only physical separation. While some loops may be separated physically from switching, not all network elements are subject to physical separation from each other. To the contrary, some network elements cannot be physically separated when provided to a CLEC without also disrupting service to all customers. That is why the ILECs are talking of physically separating only some, but not all, network elements.

The BOCs' argument against logical methods of combining elements is thus as disingenuous as it is unfounded. The whole ILEC enterprise of insisting on a manual form of connecting wires is, moreover, anachronistic. We live in a world in which the network connections to set up network elements and connect calls are measured in fractions of seconds -- and companies compete on that basis. Yet the ILECs want to impose on new entrants a manual method that requires days or months to arrange in advance, degrades service, and guarantees significant customer outages. That would send the CLECs back to the nineteenth century just when the world is heading into the twenty-first. Whatever Congress intended to accomplish with the 1996 Act, enshrining that sort of antiquated service surely was not it.

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